

Privacy Rights Clearinghouse

3100 – 5th Ave., Suite B
San Diego, CA 92103

Voice: (619) 298-3396
Fax: (619) 298-5681

E-mail: bgivens@privacyrights.org
Web: www.privacyrights.org

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

December 5, 2002

RE: Comment on Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 – CG Docket No. 02-278 and CC Docket No. 92-90
ecfs@fcc.gov

Dear Secretary Dortch:

The Privacy Rights Clearinghouse (PRC) is a nonprofit consumer education and advocacy organization based in San Diego, California.¹ For over ten years the PRC has been educating consumers about ways to understand the evolving world of technology and personal privacy. Each individual's right to control how personal information is collected and used is at the core of all the PRC's endeavors.

The PRC interacts directly with the public via a telephone hotline and responds to e-mail inquiries. Consumer education is also provided through publication of a number of fact sheets, available both on the PRC's web site and by mail for those who do not have access to the Internet.² In addition, PRC staff members frequently speak at community forums on topics such as identity theft, financial privacy, and Internet privacy.

Consumer contacts with the PRC confirm the public's growing anger and frustration about the privacy invasions suffered from unwanted telemarketer solicitations, facsimile advertisements, and electronic "spam." Telemarketer complaints account for about one in ten of the thousands of contacts made to the PRC each year. The public's increasing annoyance with telemarketing calls is also a frequent topic of requests for interviews directed to the PRC from media sources. And, no matter what the topic of a PRC public presentation, someone in the audience is certain to ask, "How can I stop telemarketer calls?"

The PRC is pleased to join the Electronic Privacy Information Center (EPIC) and other organizations in support of a national do-not-call (DNC) list as well as supplemental rulemaking by the Federal Communications Commission (FCC or Commission) to strengthen the Telephone Consumer Protection Act of 1991 (TCPA). The PRC wholeheartedly endorses the findings and conclusions of the joint comments submitted by EPIC. We also join in praise for the

¹ We invite the Commission and its staff to visit our web site at www.privacyrights.org

² In response to consumer complaints about telemarketing, the PRC developed Fact Sheet Number 5 entitled *Telemarketing: Whatever Happened to a Quiet Evening at Home* www.privacyrights.org/fs/fs5-tmkt.htm

Commission's efforts in taking a step toward allowing consumers the right to privacy in their homes and in recognizing that the existing regulatory scheme is outdated.

General Comments

In recognizing the need to revisit the TCPA rules, the Commission's observations parallel those of the PRC as well as other consumer and privacy advocates. Public concern about privacy invasions in the home has increased dramatically since the TCPA rules were first adopted. This is due in no small part to new technologies that target many more households with a smaller sales staff. Technology has increased efficiency and profits for telemarketers.

At the same time, the public's sense of control of personal space has decreased despite significant expenditures of time and money attempting to avoid telemarketing calls. This includes, among other things, unlisted telephone numbers, caller identification systems, "privacy manager," answering machines, voice mail systems, and devices attached to the phone line such as TeleZapper.

These defensive devices have cost the public a tremendous amount of money. The burden on the public to stop unwanted solicitations has never been greater while the success in limiting unwanted solicitations has never been less.

In considering final rules, we urge the Commission to always bear in mind that companies that market products and services through unsolicited telephone calls, facsimile, and electronic mail have made the unilateral choice to do business in this manner. Unfortunately, the burden to stop unwanted solicitations rests solely with the consumer. And, this burden will not shift even if the Commission adopts a much-wanted national do-not-call registry. Thus, when deliberating its final rules and weighing the interests of companies that choose to do business through unwanted solicitations against the interests of personal privacy, the Commission should make sure the balance is weighted in favor of the public -- those who bear the burdens but have few choices.

The PRC believes the growing public concern about privacy invasions resulting from unwanted telephone solicitations has been more than adequately addressed by the joint comments submitted by EPIC. However, as an organization that deals directly with the public, we would like the Commission to further consider the chief conclusions we have reached from our public contact:

- (1) Further regulation is needed because the current system does little or nothing to protect privacy in the home.
- (2) The public is eager to participate in an effective, aggressively enforced do-not-call registry.

Stronger Regulation Is Needed

Company Specific Lists Should be Maintained but Improved

The PRC strongly urges the Commission to maintain the company-specific do-not-call list and the right of individuals to sue for violations of the rule. In our experience, this rule has allowed consumers to successfully sue to stop unwanted calls. However, the rule is inadequate as the sole means to stop telemarketing calls. As in all efforts that involve the public's attempt to curtail telemarketing, the company-specific rule places the greatest burden on the consumer. We believe the company-specific rule would serve a broader purpose if telemarketers were required to give those called enough information to effectively enforce the rule. Further, to increase the consumer's likelihood of being able to enforce the company-specific rule, telemarketers should be required to confirm in writing that the consumer has been placed on the company's internal do-not-call list.

TCPA rules now require telemarketers to maintain an internal do-not-call list, and to stop calling consumers who say, "Do not call me again" or "Put me on your do-not-call list." If the telemarketer, nonetheless, calls that consumer again, the consumer may file suit in state court for a violation of the TCPA. As the Commission is well aware, telemarketing is an industry made up of a large number of commercial entities that invade our homes in an effort to sell a seemingly endless number of products, services, and opportunities. This includes organizations collecting for a multitude of charities and special interest donations. Telemarketing ranges from nationally known, well recognized corporate or organizational names to the local boilerroom. Better in theory than in practice, the company-specific rule assumes that all telemarketing calls are made by "reputable" businesses and that the telemarketer will provide consumers with enough information upon which to base a lawsuit.

While company-specific do-not-call lists may benefit consumers who are repeatedly contacted by national, recognizable companies, the rule is a hollow benefit in stopping the vast majority of telemarketing calls. More often than not, telemarketing sales staff identify themselves quickly, using only a first name. Companies with generic-sounding names and toll-free telephone numbers are impossible for consumers to identify with enough specificity to file a law suit. Failure to provide identifying information is common practice for telemarketers that leave prerecorded messages. And, the company-specific do-not-call system provides no hope of relief from calls generated by automatic dialing systems.

Despite its limited value in curtailing many telemarketing calls, the rule should not be abandoned as it can aid consumers in stopping unwanted calls from recognizable companies. Legitimate companies that want to sell through telemarketing have operated under this requirement for a number of years and no doubt by now have established procedures in place. The effectiveness of the rule would be enhanced if companies were required to confirm in writing that consumers who ask not to be called, in fact, have some assurance that they have been placed on such a list.

The company specific do-not-call list provides the public with one small tool to curb intrusions from unwanted solicitations. Above all, people should still have the right – and expect some privacy – from simply saying to unwanted callers, "Do not call me again."

Autodialers, Predictive Dialers and Abandoned Calls

As the Commission recognized in its solicitation for comments, since the TCPA rules were initially adopted technology has significantly changed the telemarketing industry. By far the most frequent telemarketing complaint now heard by the PRC is the use of predictive dialers that leave the public hanging onto dead air. Abandoned calls are particularly troubling for the elderly and disabled who rush to answer the telephone only to find there is no one on the line. For those who are expecting a call or who fear that an urgent call might be missed, ignoring a ringing telephone is not a reasonable option. Some have expressed fear of being stalked or targeted by criminals trying to find out whether someone is in the home.

Use of automatic dialing technology allows telemarketers to reach a greater number of households with a smaller sales staff. The Direct Marketing Association (DMA) cites this increased efficiency as well as the ability of smaller telemarketers to compete with large competitors in support of the use of automatic dialing technology. However, the counter to that argument has been left unsaid. Increased efficiency and higher profit margins for telemarketers have translated into increased interruptions and annoyances for the public. And small businesses are being harmed as well. They are absorbing the costs of lost time and use of equipment associated with telemarketing and other unwanted solicitations.

There is no sound reason that private or business telephones should be burdened with abandoned calls. Automatic dialing technologies can be programmed to set an abandonment rate desired by the telemarketer. An abandonment rate of 5%, as the DMA recommends, is inadequate given the millions of telemarketing calls made each day. Only a no-tolerance rule can eliminate the privacy invasions, annoyance and fear generated by abandoned calls. For telemarketers that choose to use automatic dialing systems to increase efficiency, a sales person should be available to take every call that is answered.

The only acceptable abandonment rate for telemarketing calls is zero. The Commission should impose a no-tolerance rule for abandoned calls for all the reasons mentioned above. A further consideration is that the consumer or small business owner on the receiving end of abandoned calls does not even have the moderate amount of control offered by the company-specific do-not-call procedure.

If the Commission continues to allow abandoned calls, at the very least companies that use automatic dialing should be prohibited from blocking the telephone number from which the automatic call originates. Many telemarketers intentionally block the caller identification number from being displayed on the phone device of those they call. For many telemarketers, the type of phone system they use is technologically incompatible with the local telephone company's caller identification service. In both instances, the person on the receiving end of the call is unable to determine the phone number of the telemarketer. The ability to identify the telemarketer would at least provide a minimal amount of information about the offending caller.

The Commission has requested comment on the practice of automatic telephone dialing equipment used to identify facsimile machines. In adopting revised rules, the Commission should prohibit the use of automatic dialing equipment of this purpose. This practice is particularly troubling for small business owners who often work out of home offices. Calls to facsimile

machines not only deprive the owner of the use of the equipment but create an annoyance that often interrupts important business calls. Furthermore, such interruptions cannot be characterized as telemarketer calls since there is no immediate intent to solicit but rather only a means to screen numbers for a later solicitation.³ The practice should be prohibited.

The Commission has also solicited comment on the rules that apply to predictive dialers. As EPIC's comments note, there is no real distinction between predictive dialers and other forms of automatic dialing equipment. Indeed, for the person on the receiving end of an abandoned call, there is no difference at all. The rules should be consistent for all forms of automatic dialing equipment.

Prerecorded Messages

Escalating use of recorded messages left on answering machines and voice mail systems is another area of growing public concern. Prerecorded messages may be unsolicited offers of products and services in violation of the TCPA rules that prohibit such messages. One example is the flood of offers from companies offering homeowners a lower mortgage rate or home equity loan. Other messages attempt to mask the solicitation by offering free trial offers, free vacations, or prizes and contests the consumer has no memory of having entered. The object here is to entice the consumer into returning the call for the ultimate purpose of selling a product or service.

Absent prior consent from the person being called or emergency announcements from public safety organizations, the Commission should prohibit prerecorded messages. This prohibition should apply whether the message directly or indirectly solicits the customer.

Greater Need to Identify Telemarketing Calls

The public has gone to great expense to identify and eliminate telemarketing calls. Systems developed by most telephone companies to provide consumers with the identity of the caller have proven ineffective through the use of blocked identification by telemarketers. The Commission should prohibit the use by telemarketers of caller number blocking.

In addition, for those telemarketing calls that are answered, the Commission should adopt rules that provide consumers with specific information about the identity of the caller. Specifically, any company that chooses to use telemarketing as a means of doing business should clearly:

- Identify the first and last name or an agent number of the sales person making the call.
- Give the true name the company.
- Give a telephone number the consumer can call if he or she wishes to contact the company.

³ If the Commission believes it necessary, it should clarify that the term "telemarketer" includes not only a person or entity making a telephone solicitation to deliver an unsolicited advertisement, but also one that uses a screening system for the purpose of later making unsolicited calls.

- Give the address at which the company does business.
- Provide reason for the call.

Rules Should Apply to Business-to-Business Calls and Wireless Numbers

The Commission should extend the reach of the TCPA rules to include unwanted solicitations made to wireless numbers and businesses. An increasing number of consumers are using cell phones for business as well as personal use. Furthermore, the changing landscape of the workplace means that more people are either working at home or have established small businesses in home offices. The line between business and personal use of telecommunications has been permanently blurred. For this reason, the TCPA rules should apply the same standards to all unwanted solicitations, whether the solicitation is made to a business, a residence or a wireless number.

Enforcement by States

The Commission should avoid any action that would prevent any state from acting on behalf of its own citizens. As we discussed previously, the industry broadly characterized as “telemarketing” is made up of any number of different entities that solicit for a vast array of reasons. This ranges from companies that solicit for legitimate sales to entities that blatantly engage in fraudulent practices.

While the Federal Trade Commission has done a good job of bringing actions against fraudulent telemarketing, successful enforcement of fraudulent practices depends on cooperative state and federal enforcement as well as the ability of states to enforce their own laws. This is particularly important for states such as California, New York, and Florida that have high occurrences of telemarketing fraud.

Nor should the Commission preempt states from passing more restrictive requirements for telemarketers that send unsolicited advertisements or offers through the use of facsimile machines, automatic dialing systems, and prerecorded messages. State authorities should retain the ability to act, depending upon the degree of public feedback and the attitude of voters in each state.

National Do-Not-Call Registry

The Commission should coordinate with the Federal Trade Commission to adopt a single national do-not-call registry. From our experience, the public is eager to participate in a system that offers an effective and enforceable means to stop or at least reduce unwanted telephone or other telecommunication solicitations. At the same time, consumers who want to register for a national registry should not have to follow separate procedures established by two federal agencies. And, from the standpoint of cost to the taxpayers, to have the government establish and maintain two separate do-not-call registries seems to be a duplication of effort.

One of the disadvantages of having separate FCC and FTC do-not-call registries is the inconvenience of having to sign up for both. Another disadvantage concerns jurisdictional limits. A combined FCC/FTC do-not-call registry should cover the entire spectrum of commercial telemarketing calls. Because of jurisdictional boundaries, a solely FCC do-not-call registry would leave out certain categories of telemarketers as would a solely-FTC registry. In crafting a joint registry, regulators should make sure that all categories of telemarketers are required to comply.

We reiterate the suggestions offered by EPIC as objectives the Commission should strive for in establishing such a national list. Namely,

- The national list should be free to consumers.
- The costs of maintaining the national registry should be borne by companies wishing to conduct business through telemarketing.
- No new databases containing personal information should be established.
- A telephone number alone is sufficient for registration.
- The registry should be available for private as well as business numbers.
- The registry should include numbers attached to facsimile machines as well as cell phones.
- Consumers should not have to re-register, or at a minimum they should have to re-register no more frequently than every five years, the same as the DMA's Telephone Preference Service.

Again, the PRC is pleased to join with other organizations in encouraging the Commission to revisit outdated rules and regulations governing the telemarketing industry.

Sincerely,

Beth Givens, Director
Tena Friery, Research Director
Privacy Rights Clearinghouse